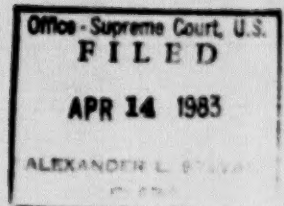


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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1982

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NO. 82-6172

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JIMMY LEE GRAY,

Petitioner,

VERSUS

EDDIE LUCAS, Warden, and THE ATTORNEY  
GENERAL FOR THE STATE OF MISSISSIPPI,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT

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REPLY BRIEF

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### REPLY BRIEF

In his petition for writ of certiorari, the petitioner, Jimmy Lee Gray, presents three separate questions that merit review in this Court. Petitioner asserts that this Court should grant certiorari (1) to consider whether the Eighth and Fourteenth Amendments require that the reasonable doubt standard be applied in determining whether a death sentence is the appropriate punishment in a particular case, (2) to determine whether the scope and nature of counsel's duty under the Sixth Amendment to investigate and prepare in a capital case is greater than in a noncapital case, and (3) to determine whether the prosecutor's surprise interjection at sentencing of the nonstatutory aggravating circumstance of petitioner's future dangerousness violated the Eighth and Fourteenth Amendments.

Respondents' brief in opposition merits a brief reply with respect to the second and third questions presented for review. The sound considerations supporting the grant of certiorari to review the first question presented have been addressed in the petition. Additionally, petitioner would note that the propriety of the application of the reasonable doubt standard to a capital sentencing proceeding is a question of profound national significance and one that requires careful analysis of the requirements of the Fourteenth Amendment to the Constitution of the United States. Respondents' suggestion that this is a matter appropriately left to haphazard and inconsistent determinations by state courts - when matters of life or death are at stake - is wholly unsupportable.

With respect to the second question presented, the underpinning of the respondents' opposition is that this "court, historically and traditionally, has left the matter of formulating a test of effective representation by counsel to the lower courts." (Opp. at 15). This statement is patently in error, for this Court has recently granted certiorari in a case that raises issues directly relating to the standards for the assessment of allegations of ineffective assistance of counsel in a criminal case.



United States v. Cronic, No. 82-660, cert. grtd, \_\_\_ U.S. \_\_\_, 51 U.S.L.W. 3611 (February 22, 1983). Surely, the resolution of the questions presented in Cronic will have direct bearing and relevance to the proper disposition of the petitioner's case. However, the present case presents the additional important question of what standards should be applicable to the evaluation of claims of ineffective assistance of counsel in a capital case. Therefore, the present case provides an indispensable companion to Cronic, and is one that should be appropriately considered at the same time. Consequently, the reasons for granting certiorari are even more compelling in the aftermath of the decision to review Cronic.

Indeed, this is fully consistent with the position asserted in respondents' opposition. Respondents' intimate that it would be inappropriate for this Court "to formulate a workable heightened standard when there has been no prior formulation of the workable norm." (Opp. at 20). However, now that the "workable norm," will be articulated, it would be timely, even under respondents' view of the case, to consider the critical question of the scope and nature of counsel's obligations in a capital case. At the very least, the resolution of the appropriateness of certiorari should await this Court's disposition of the questions presented in Cronic.

Finally, in discussing the third question presented, the respondents have neglected the fundamentally unfair result in this case: the court of appeals resolved one of petitioner's federal constitutional challenges by finding, for the first time, that the prosecutor, not the state psychologist, interjected the issue of future dangerousness into the jury's deliberations. Gray v. Lucas, 677 F.2d 1086, 1095-96 (5th Cir. 1982). It makes little sense for respondents to assert that this issue was not previously raised when no previous court, nor the trial record in these proceedings, ever suggested that the prosecutor, rather than the psychologist, had presented the issue of future dangerousness to the jury. After the court of appeals presented its novel

view of the record, petitioner therefore protested, at the first possible instance, that the prosecutorial interjection of non-statutory aggravating circumstances into the sentencing hearing violated the Eighth Amendment. Yet, he was rebuffed on rehearing by the court of appeals.

Surely, the petitioner cannot be faulted for not presenting an issue earlier that was not supported by the record nor suggested by any state or federal court that had reviewed this case. Rather, the issue was fashioned by the court of appeals in response to petitioner's claim of ineffective assistance of counsel. If this issue is not properly before the Court, as respondents' suggest, petitioner submits that fundamental notions of fairness and justice dictate that the case should be remanded to the United States Court of Appeals for the Fifth Circuit to consider an issue on the merits that is the self-created product of the Court's resolution of petitioner's other claims for relief.

#### CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, petitioner respectfully requests that his petition be granted.

Respectfully submitted,



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